No. 98-454

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Supreme Court of the United States

October Term, 1998

CITY OF CINCINNATI; ROXANNE QUALLS, Councilmember and Mayor of the City of Cincinnati; DWIGHT TILLERY, Councilmember; TYRONE YATES, Councilmember; TODD PORTUNE, Councilmember; BOBBIE STERNE, Councilmember; PHILIP M. HEIMLICH, Councilmember; MINETTE J. COOPER, Councilmember; THOMAS A. LUKEN, Councilmember; NICHOLAS J. VEHR, Councilmember; CHARLES WINBURN, Councilmember; JOHN F. SHIREY, City Manager of the City of Cincinnati,

Petitioners,

v.

JOHN R. KRUSE; KRUSE FOR COUNCIL COMMITTEE; THOMAS E. BRINKMAN, JR.; MARK W. MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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14 pp

TABLE OF CONTENTS

Page

I. THE CONFLICT WITH *BUCKLEY* WARRANTS REVIEW OF THE SIXTH CIRCUIT'S DECISION.. 1

A. The Sixth Circuit Did Not Weigh The Facts Presented In This Record 2

B. Petitioners Are Not Limited To The Legislative Record to Support The Compelling Interests That Justify Spending Limits 3

C. Cincinnati's Interest In Preserving The Time Of Elected Officials To Govern Is New And Different From The Interests Presented in *Buckley* 5

D. The *Buckley* Record Did Not Include The Evidence Of A Blackout Phenomenon 6

E. This Court In *Buckley* Did Not Close The Door To New Facts Demonstrating The Necessity For Spending Limits To Address The Compelling Governmental Interest Of Preventing Corruption And The Appearance Of Corruption 8

II. IF *BUCKLEY* HELD THAT CAMPAIGN SPENDING LIMITS ARE *PER SE* UNCONSTITUTIONAL, THIS COURT SHOULD NOW REVISIT THAT RULING..... 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 7

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) 4

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Burson v. Freeman, 504 U.S. 191 (1992) 5

Califano v. Goldfarb, 430 U.S. 199 (1977) 4

Contractors Ass'n v. City of Philadelphia, 6 F.3d 990 (3d. Cir 1993) 5

Coral Construction Company v. King County, 941 F.2d 910 (9th Cir. 1991) 5

Florida Bar Assoc. v. Went For It, 515 U.S. 618 (1995) 5

Harrison & Burrowes Bridge Constructors v. Cuomo, 981 F.2d 50 (2d Cir. 1992) 5

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 4

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 10

Renton v. Playtime Theatres, Inc., 474 U.S. 41 (1986) 2

Roth v. United States, 354 U.S. 476 (1957) 7

Sable Communications v. F.E.C., 492 U.S. 115 (1989) 4

Shaw v. Hunt, 116 S. Ct. 1894 (1996) 3, 4

Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174 (1997) 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Virginia, 116 S. Ct. 2264 (1996) 3, 4

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 4

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 4

As stated in the petition, in the *amici* briefs of twenty-six states and eighteen secretaries of state or chief elections officers, and in this reply, certiorari is appropriate in this case to correct the Sixth Circuit's decision in conflict with this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976). In the alternative, if the Sixth Circuit's ruling is consistent with *Buckley*, certiorari is appropriate to reconsider *Buckley* in light of new facts and circumstances associated with unlimited campaign spending.

I. THE CONFLICT WITH *BUCKLEY* WARRANTS REVIEW OF THE SIXTH CIRCUIT'S DECISION.

Respondents' claims notwithstanding, this Court did not hold in *Buckley* that all campaign spending limits – regardless of the facts and circumstances – are *per se* unconstitutional. It held that "[n]o governmental interest *that [had] been suggested* [was] sufficient to justify [the congressional campaign spending limits]." *Buckley*, 424 U.S. at 55 (emphasis added). It further held, based on the facts presented, that contribution limits alone were sufficient to address the compelling governmental interests of preventing corruption and the appearance of corruption, and that, therefore, campaign spending limits were unnecessary to address such interests. *Id.* at 55-56.

Respondents now attempt to shift attention from this core issue by contending that the factual record and compelling governmental interests presented in this case, at this summary judgment stage, matches the factual record and compelling governmental interests presented to this Court in *Buckley*. A fair reading of the record here reveals that Cincinnati has presented new interests and new facts unavailable to the *Buckley* Court which demonstrate the necessity for campaign spending limits in its local elections. The Sixth Circuit's ruling foreclosing the

consideration of these new interests and new facts endangers the ability of state and local governments to address serious threats to their democratic processes resulting from unlimited campaign spending.

A. The Sixth Circuit Did Not Weigh The Facts Presented in this Record.

Respondents repeatedly assert that the Sixth Circuit fully considered all of the facts in the record and the new and compelling governmental interests which Cincinnati presented to justify its campaign spending limits. The Sixth Circuit's ruling, however, is based on the premise that, according to *Buckley*, all campaign spending limits are *per se* unconstitutional. App. 18-20. Under this misreading of *Buckley*, the facts did not matter.

In each instance the Circuit Court analyzed the City's proffer of facts related to this appeal, it rejected those facts not on their sufficiency but "as a matter of law." App. 19, 20, 21, 22. In addressing Cincinnati's interest in preventing corruption and the appearance of corruption, the Sixth Circuit states: "[W]ere we to consider the City's factual allegations, it has failed to present any evidence that spending limits are necessitated by the failure of contribution limits." App. 20. As it had the right to do, Cincinnati relied upon the twenty-two years of federal election experience with contribution limits and unlimited campaign spending to demonstrate the necessity for its spending limits. *Renton v. Playtime Theatres, Inc.*, 474 U.S. 41, 51-52 (1986).

The Sixth Circuit dismissed Cincinnati's interest in preserving the time of elected officials to carry out their representative duties with entirely circular reasoning. It states:

> The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, *which admittedly detracts an officeholder from doing her job*, cannot serve as a basis for limiting campaign spending. App. 22-23 (emphasis added).

As to Cincinnati's interest in preventing the blackout phenomenon with respect to television advertising time, the Sixth Circuit fails to address that interest in any way. The Circuit Court plainly did not weigh the sufficiency of the evidence proffered by the City; rather, it categorically rejected it as a matter of law.

B. Petitioners Are Not Limited to the Legislative Record to Support the Compelling Interests That Justify Spending Limits.

Respondents repeatedly urge an incorrect standard upon the Court, contending that "a compelling interest cannot properly be advanced by the *government's* counsel if it was not relied upon by the governmental body at the time of enactment." Opp. Br. at 20, 28-29.[1] As support for this notion, they cite only *United States v. Virginia*, 116 S. Ct. 2264 (1996), and *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996), two entirely inapposite cases that address the Fourteenth Amendment's prohibition of legislative discrimination.[2] Respondents mistakenly assume that the

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[1] The Brief in Opposition to Petition for a Writ of Certiorari will be referred to as "Opp. Br."

[2] Respondents' citations are profoundly disingenuous. Only three sentences before the quotation selected by Respondents, the Court unequivocally explained that it was announcing "directions for cases of official classification based

judicial inquiry into legislative purposes described in the Court's cases analyzing statutory differential treatment based on race, gender or religion[3] must also be made in a case involving a narrowly tailored, non-discriminatory regulation of campaign expenditures.[4] However, the standard for the analysis of campaign spending limits is well established: the government must demonstrate that the ordinance is "narrowly tailored to serve a compelling state interest." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citing *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (per curiam)). This standard does not mandate an inquiry into the City Council's actual deliberations. On the contrary, such an inquiry has been specifically disavowed. The Court reviews legislation that allegedly violates the First Amendment in light of all available evidence, and not merely by reference to recorded excerpts of the legislative history. *See Sable Communications v. F.E.C.*, 492 U.S. 115, 133 (1989) (Scalia, J. concurring).

In First Amendment cases, the Court regularly looks beyond legislative history, relying on its own value judgments, publicly available material, and the experience of other jurisdictions to find support for compelling state

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on gender" under the Fourteenth Amendment. *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996).

[3] *E.g., United States v. Virginia*, 116 S. Ct. 2264 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 (1982); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 223-224 (1977) (Stevens, J., concurring).

[4] The court does look to legislative intention for the limited purpose of determining a statute's content-neutrality. *See e.g. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

interests. As this Court noted in *Florida Bar Assoc. v. Went For It*, 515 U.S. 618, 628-29 (1995):

> "[I]n . . . First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . *or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense,' Burson v. Freeman*, 504 U.S. 191, 211, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992)." (emphasis added and other internal citations omitted).

Accordingly, the City may produce evidence supporting the constitutionality of its ordinance, even it was not explicitly "relied upon . . . at the time of enactment."[5] Opp. Br. at 20.

C. Cincinnati's Interest in Preserving the Time of Elected Officials to Govern is New and Different From the Interests Presented in *Buckley*.

Cincinnati has presented a new and compelling governmental interest that justifies its campaign spending limits: the interest in freeing its elected officials from the pressures of fundraising to ensure that they are able to carry out their representative duties without interference. Contrary to Respondents' claims, this Court in *Buckley* was never presented with and never considered this interest in addressing the congressional campaign spending limits.

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[5] Even if this Court were to require an inquiry into the legislative justifications, the government may offer additional factual evidence amassed following enactment of the ordinance in question. *See Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3d. Cir 1993); *Harrison & Burrowes Bridge Constructors v. Cuomo*, 981 F.2d 50 (2d. Cir. 1992); *Coral Construction Company v. King County*, 941 F.2d 910 (9th Cir. 1991).

To buttress the claim that the *Buckley* Court weighed this interest, respondents rely entirely on language in Justice White's dissenting opinion which noted that spending limits would "ease the candidate's understandable obsession with fundraising, and so free him and his staff to communicate in more places and ways unconnected with the fundraising function." Opp. Br. at 18, quoting *Buckley*, 424 U.S. at 265 (White, J., dissenting). Yet, the interest Justice White identifies does not match the interest presented in this case. Cincinnati instead focuses on preserving the time *elected officials* need to carry out their official duties. The "independent interest in freeing officeholders from the pressures of fundraising so they can perform their duties," App. 29 (Judge Cohn, concurring), warrants consideration by this Court.

The authorities cited by the City, which are in the public record, concerning the twenty-two years of experience of unlimited campaign spending in federal elections and the associated burdens of fundraising by elected officials provide added weight to Cincinnati's new and compelling governmental interest justifying its campaign spending limits. Pet. at 22-23; *id.* at 23, n.29.

D. The *Buckley* Record Did Not Include the Evidence of a Blackout Phenomenon.

Respondents and the Sixth Circuit ignore the gravamen of the blackout phenomenon cited by petitioners as an independent interest justifying spending limits. The issue is not a matter of unequal resources. Rather, the City has shown that what the *Buckley* Court called an "indispensable instrument[ ] of effective political speech" can be, and is, *monopolized* by individual candidates. *Buckley*, 424 U.S. at 19. As the result of "excessive purchases" of television advertising (R.No.38, Galvin Aff., 4),

some candidates' access to the medium is completely denied. In a limited medium, where the viewing habits of the electorate are quantified for commercial purposes, individual candidates can and do dominate the forum to the exclusion of others. These facts undermine the *Buckley* Court's critical assumption that more campaign speech is always available through more spending. The City has shown that spending limits are necessary precisely "to assure the unfettered interchange of ideas" that the First Amendment requires. *Buckley*, 424 U.S. at 14 (citing *Roth v. United States*, 354 U.S. 476 (1957)).

Respondents claim that "[t]here is . . . no evidence supporting the allegation of a systemic 'blackout' or that such a 'blackout' has any detrimental effect on candidates." Opp. Br. at 25. This is untrue. The record in this case includes expert evidence that, in Cincinnati city council elections, candidates with large sums of money early in the election season engage in media campaigns which "have the effect of preempting the right of other, less well-funded candidates [from] purchas[ing] the most valuable advertising spots." R.No.38, Galvin Aff., 4. Further, these media campaigns, involving "unnecessarily excessive quantities of television advertisements" and creating "an effective monopoly on the most valuable advertising time," "effectively restrict[ ] access to voters for less well-funded candidates." *Id.* at 4-6. This Court in *Buckley* was not presented with and did not consider this interest and these facts.

At the very least, Respondents' arguments highlight that there are "genuine issues of material fact" on the blackout phenomenon in Cincinnati which must be resolved at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

E. This Court in *Buckley* Did Not Close the Door to New Facts Demonstrating the Necessity for Spending Limits to Address the Compelling Governmental Interest of Preventing Corruption and the Appearance of Corruption.

Respondents repeat the error of the Sixth Circuit's ruling in claiming that "*Buckley*'s invalidation of electoral limits was not dependent on any specific record evidence . . . " Opp. Br. at 3. This Court in *Buckley* specifically looked to the record before it and found:

> There is no indication that the substantial criminal penalties for violating contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions. *Buckley*, 424 U.S. at 55-56.

The record in this case presents new facts which show that contribution limits alone have proved insufficient to address the compelling governmental interest in preventing corruption and the appearance of corruption in the electoral process. Pet. at 14-21.

Respondents claim that "the City can provide no evidence suggesting that the absence of spending limits, as opposed to contribution restrictions, has caused any of the public dissatisfaction they identify." Opp. Br. at 23. This too is untrue. The City presented expert evidence of a pervasive public perception of corruption in Cincinnati with respect to the city council election process *directly tied to unlimited campaign spending*. Pet. at 17, n.24, citing R.No.38, Deardourff Aff., 9-10. The *Buckley* record did not include this evidence.

Respondents also claim that "[t]here is not a scintilla of evidence . . . that spending caps will somehow reduce large donor influence . . . " Opp. Br. at 4. Yet, respondents stipulated in the record that "the rise in the overall cost of

city council races *has caused* a rise in the influence of wealthy donors in the City's elections, with such donors increasingly dominating the campaign fundraising process." R.No.38, Statement of Facts, No.9, 4; Makinson Aff., 6-7. If so, it follows that campaign spending limits would reduce large-donor influence and the dangers of corruption associated with that influence.

Further, the federal election experience of the past twenty-two years demonstrates that unlimited campaign spending fuels the pressure to evade contribution limits. Pet. at 18-19, n.25-26. Respondents contend that "[a]ll we have here, as in *Buckley*, is a legislative prediction that expenditure limitations will 'reduce the incentive' to violate contribution ceilings." Opp. Br. at 12. Here, in fact, we have much more: twenty-two years of federal election experience with contribution limits and unlimited campaign spending to "support[ ] the reasonableness of [the City's] predictive judgment" that spending limits are necessary. *See Turner Broadcasting System Inc. v. FCC*, 117 S. Ct. 1174, 1193 (1997). Respondents' claim that the effective answer to this experience "is to close [the] loopholes," Opp. Br. at 5, presents a genuine issue of material fact to be resolved at trial.

II. IF *BUCKLEY* HELD THAT CAMPAIGN SPENDING LIMITS ARE *PER SE* UNCONSTITUTIONAL, THIS COURT SHOULD NOW REVISIT THAT RULING.

Respondents contend that Cincinnati does not ask this Court to revisit *Buckley*. Opp. Br. at 26. The petition makes clear, however, that if *Buckley* declared all campaign spending limits *per se* unconstitutional and closed the door to new facts, this Court should now reconsider that ruling based on changed circumstances associated

with unlimited campaign spending. Pet. at 26-29. When changed circumstances "impose new obligations," this Court has recognized its "constitutional duty" to overrule a prior case. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992).

CONCLUSION

For the reasons stated in our petition, as well as in this reply, the petition for a writ of certiorari should be granted.

DATED: October 23, 1998

Respectfully submitted,

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